No. 22-___

IN THE

Supreme Court of the United States

LEE JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the courts of appeals, under *Young v. United States*, 315 U.S. 257 (1942), have an "independent obligation" to craft and consider forfeited legal arguments in criminal cases?

RELATED PROCEEDINGS

United States v. Jones, No. 4:20-cr-00750-DAP-1, U.S. District Court for the Northern District of Ohio. Judgment entered on July 8, 2021.

United States v. Jones, No. 21-3636, U.S. Court of Appeals for the Sixth Circuit. Judgment entered on November 16, 2022.

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INTRODUCTION

"This is a case about judicial power and its limits." *United States v. Campbell*, 26 F.4th 860, 891 (11th Cir. 2022) (*en banc*) (Newsom and Jordan, J.J., dissenting). Specifically, it is about the tension between our judicial system's longstanding principle of party presentation and a court's obligation to issue decisions that correctly apply the law. This tension is particularly acute when a party fails to raise a potentially winning legal argument.

As a "general rule," this Court has suggested that the party-presentation principle controls—such that courts should reach forfeited arguments only in extraordinary circumstances. *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579, 1581 (2020). This is true even though this principle may (and often does) result in decisions that would have turned out differently had the court *sua sponte* considered all relevant legal issues. Even in cases involving "obviously guilty" criminals, "it is fundamental" to the rule of law that judges are neutral arbiters who decide only the issues presented by the parties. *United States v. Pryce*, 938 F.2d 1343, 1352 (D.C. Cir. 1991) (Silberman, J., dissenting in part). As such, when parties abandon arguments—regardless of merit—those arguments are dead, and courts should only rarely resurrect them (and never by default). *Sineneng-Smith*, 140 S. Ct. at 1581.

The Sixth Circuit's decision below abandons this principle where it perhaps matters most—in the criminal justice context. Petitioner Lee Jones prevailed on the merits of his appeal after convincing both the court of appeals and the government that his

guilty plea was improper under Federal Rule of Criminal Procedure 11. In particular, the trial court sentenced Mr. Jones to 57 months—far exceeding the 27-month maximum that Mr. Jones had discussed with the government and the trial court. The appeal's only disputed issue concerned the appropriate remedy for this violation. Based on circuit precedent, Mr. Jones asked the court of appeals to direct the entry of a 27-month sentence—which, at that point, he had already largely served. The government forfeited its opposition to this request. But the court of appeals nevertheless denied Mr. Jones's requested relief by crafting its own arguments as to why that relief was improper. The court thus denied Mr. Jones's request and remanded the case for further proceedings.

To justify this outcome, the Sixth Circuit reasoned that this Court's 1942 decision in *Young v. United States*—which involved a stipulated construction of a federal statute—compelled the court to ignore the government's forfeiture. Pet.App.4a–5a (citing *Young v. United States*, 315 U.S. 257, 258–61 (1942)). But this was a novel extension of *Young* that no other court of appeals has endorsed. Even worse, it removed the court from its role as neutral arbiter and placed it on the government's side of the case. This stark departure from adversarial norms warrants this Court's intervention for four reasons.

First, the decision deepens an existing circuit split regarding when—if ever—a court is obligated to reach forfeited issues. Second, the decision below is wrong and conflicts with this Court's forfeiture jurisprudence. Third, because forfeitures happen regularly in our adversarial system, the question presented is one of exceptional importance. Finally,

this case is an ideal vehicle for resolving this important question. Accordingly, this Court should grant certiorari.

OPINION BELOW

The decision of the U.S. Court of Appeals for the Sixth Circuit (Pet.App.1a–8a) is reported at 53 F.4th 414.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 2022. The court of appeals denied Mr. Jones's petition for rehearing *en banc* on January 11, 2023. On April 4, 2023, Justice Kavanaugh granted an extension of time to file this petition up to and including June 9, 2023. No. 22A861 (U.S.). Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Underlying Conduct

On August 1, 2020, an Ohio police officer pulled over Lee Jones after allegedly observing him commit a traffic violation. Police found two firearms in Mr. Jones's car, and because of his criminal history, Mr. Jones was charged as a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Indictment, D. Ct. Dkt. No. 1, PageID # 1. He initially pleaded not guilty and filed a motion to suppress evidence of his firearm possession. Motion to Suppress, D. Ct. Dkt. No. 15, PageID ## 44–48. But before that motion was heard, Mr. Jones indicated he wanted to change his plea to guilty. At the time, his attorney and the government both informed Mr. Jones that he would receive a Sentencing Guidelines range

with a maximum of no more than 27 months. Pet.App.17a–18a. Mr. Jones did not enter into a formal plea agreement.

B. District Court Proceedings

1. Mr. Jones's February 4, 2021 change-of-plea hearing involved numerous Rule 11 violations that left Mr. Jones with the false (but reasonable) impression that he faced a maximum sentence of 27 months. Because the district court had failed to communicate to Mr. Jones that it was possible for Mr. Jones's sentence to exceed the government's estimate, the 57-month sentence that the district court ultimately imposed rendered Mr. Jones's plea unknowing and involuntary—as even the government conceded on appeal.

First, the district court failed to confirm that Mr. Jones understood the maximum possible penalty for his crime. After Mr. Jones answered a few basic biographical questions, the court asked:

> Mr. Jones, you understand you're proposing to plead guilty to being a felon in possession of a firearm and ammunition. *The maximum penalty is ten years in prison*, $250,000 fine, three years supervised release, and a $100 special assessment. And supervised release is a period after any prison sentence. The main condition is not committing any new crime. There might be drug testing or other conditions, and if you violate a condition of supervised release, you come back to me for a hearing. Do you understand that?

Pet.App.13a–14a (emphasis added). Mr. Jones did not understand. Instead, he responded: "No. I didn't

understand that one, Your Honor." Pet.App.14a. Mr. Jones then added that he "thought [his] guideline was something different." *Id.*

The district court told him "No. We're not even at the guidelines." *Id.* After Mr. Jones said "Oh," the court revisited its explanation of supervised release but not the statutory maximum sentence, which Mr. Jones never stated he understood. *Id.*

Second, the district court suggested that its decision at sentencing would be a binary choice between the government's and Mr. Jones's guideline calculations. During the court's discussion of "Mr. Jones's advisory range," the government indicated that Mr. Jones's base offense level was 18 and that he was in Criminal History Category II. Pet.App.17a. As a result, the government argued that his sentence should be between 21 and 27 months. *Id.* Urging a lower base offense level of 14, Mr. Jones's attorney estimated that the sentence should be between 12 and 18 months. Pet.App.17a–18a.

The Court then explained:

> All right. Well, Mr. Jones, I'll have to decide whether you start at an 18 or a 14. The parties seem to agree that you're a Criminal History Category II. A 15/II is 21 to 27 months. A 12/II is 12 to 18 months. Okay. Do you see how that works?

Pet.App.18a. Mr. Jones responded "Yes." *Id.* The court then stated there is "no parole. So if you get 12 months or 18 months or 21 months or whatever, that's what you have to serve." *Id.* Mr. Jones affirmed that he understood. Pet.App.18a–19a.

Third, though the court later mentioned that the probation department would prepare a presentence report ("PSR") for use at sentencing, the court failed to explain the PSR's potential impact on Mr. Jones's ultimate sentence. Pet.App.24a. The court thus never explained that (1) Mr. Jones' criminal history could be higher than Category II, (2) the PSR could result in a Guidelines range different from what was discussed during the change-of-plea hearing, or (3) the court could depart from the Guidelines range, up to the statutory maximum. Instead, the court simply indicated the sentencing range would be between 12 and 27 months by stating that it would "decide whether [Mr. Jones] start[ed] at an 18 or a 14" base offense level. Pet.App.18a. As a result, Mr. Jones pled guilty with the reasonable (though flawed) understanding that the worst-case scenario was that he spend 27 months in prison.

In the PSR, the probation department determined Mr. Jones had a criminal history of Category IV—not Category II—and a total offense level of 19. Pet.App.33a–34a. That meant his sentencing range was 46 to 57 months—more than double what was discussed during the plea hearing. Pet.App.34a. Based on these calculations, the district court ultimately sentenced Mr. Jones to 57 months.

2. Mr. Jones's shock at the 46- to 57-month range was obvious at his sentencing hearing, which took place in July 2021. Pet.App.28a–51a. After a tense exchange with the court over which version of the PSR

was in effect,[1] Mr. Jones addressed the court. Pet.App.38a–39a. He left no doubt about his confusion regarding the sentence he faced:

> And, you know, at a time when I did change my plea, you know, I thought me and you had a conversation of a agreement to where, you know, you said you would decide whether I'm at a 14 or a 18 and, you know, I didn't understand that, okay, if a — my PSI come back and it says something different that it could put me in a badder situation because in all actuality I would have took the deal, you know, if I knew — if that was going to come back to haunt me like that, you know, but at the same time, I just didn't want to take the deal because the guns wasn't stolen, you know. I know my wife had these legally owned by her but at the same time, you know, when I talked to you —

Id. The court interrupted to clarify that whether the weapons were stolen was not at issue. Pet.App.39a–40a. Mr. Jones then continued:

> Okay. So the final report, no, it's not in there, correct, but when I had the conversation with you with the change of plea date, that's when it came about. You said you going to decide whether I was at a 14 or a 18. We agreed on —

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[1] The court went so far as to threaten to postpone the sentencing hearing indefinitely if Mr. Jones failed to locate the proper version of the PSR: "This is the last time I'm going to ask the question . . . . If the answer is no, you go back to jail[.] I don't care for how long." Pet.App.32a.

Pet.App.40a. The court once again interrupted to explain:

> [Court]: I said I'll decide where you are. I didn't know. All right? The government thought you would have been — start at 18 and your lawyer thought it would be a 14.
>
> [Mr. Jones]: Right.
>
> [Court]: Again, no Plea Agreement. Had — you could have entered into a Plea Agreement and it would have had an agreed-upon guidelines computation or — at something.

Id. Mr. Jones summarized his objection:

> But it was just like a lot of mis- — misguidance into it because if I knew it was then, I would have went through with my Suppression Hearing, I would have had a — tried to have a chance to fight it, but since I'm, like, okay, he said I'm going to decide if I'm at a 14 or 18, I agreed to it and I changed my plea of guilty so that was where I came into play at trying to see, okay, I'm looking at from 12 to 27.

Id. The court responded that if Mr. Jones's "plea wasn't knowing and voluntary, you should have filed a Motion to Withdraw your Guilty Plea." Pet.App.40a–41a. "It's awfully late now," the court continued, "but you can still do it. You can still file the motion. Now, whether I'll grant it or not, I don't know." Pet.App.41a.

Mr. Jones asked for clarification on that process, but after the court indicated that he would lose points for acceptance of responsibility and a timely plea if he even attempted to withdraw his plea, Mr. Jones

relented. Pet.App.41a–42a. Moments later, however, Mr. Jones reiterated his confusion after the court asked him if he would like to say anything else:

> No. I was just — it's just the same thing because, you know, I thought we had a understanding at the change of plea and it just — it just confused me. That's all. Through the whole process, you know, I thought we had a stand where we was like, okay, I'm going to decide whether you get this or you get that.

Pet.App.42a. The court responded, "but I didn't know, and I told you I didn't know and wouldn't know until I saw the report . . . . You had the option to nail it down in the Plea Agreement with a specific guidelines computation." Pet.App.43a. Mr. Jones responded:

> Right, so that's where the prosecution came in at and I'm thinking she — I'm thinking she did a fine job with her research and you was going along with it and everybody agreed to it so, you know, I didn't think something else would change that, especially when we had an agreement on it.

Id. The court responded that "there was no agreement on it, sir, that's the point." *Id.* But Mr. Jones continued:

> Well, I got my transcript [of the change-of-plea hearing] in here saying — where we was talking, me and you, and you was saying, okay, I'm going to allow this to go through and I will decide whether you at a 14 or 18. Y'all agree — we all agree on the category, and that you will be at a 12 to 27, and I said okay, Your Honor.

Id. The court (incorrectly) insisted, "I'm sure I also said I won't know your Criminal History Category

until I see the report." *Id.* But Mr. Jones responded (accurately), "I can pull [the transcript] out now. It's nowhere near in there." Pet.App.44a. Perhaps recognizing its error, the court stated, "If I didn't, I was mistaken but everyone knows that's the case. It's not — there's not — no one knows the criminal history until you see the report." *Id.*

But Mr. Jones did *not* know that that was the case. Thus, he replied, "See, that's where I was thrown off at." *Id.* The court renewed its offer for Mr. Jones to file a motion to withdraw his plea—but did not modify its statements that it might deny the motion and leave Mr. Jones with an even longer sentence. *Id.* The following exchange then took place:

> [Court]: If you want to file a Motion to Withdraw your plea saying you were misled, you have a right to file the motion. Do you want to talk it over with your lawyer?
>
> [Mr. Jones]: No. I want to talk to over with my family.
>
> [Court]: Well, we'll put this off for a month. I don't care. I mean — (Brief pause in proceedings)
>
> [Mr. Jones]: Okay. Never mind.

Id. The court confirmed Mr. Jones did not want to file a Motion to Withdraw and then proceeded onward with sentencing. Pet.App.44a–45a. After hearing from the government, the court sentenced Mr. Jones to 57 months in prison, 3 years of supervised release, and a $100 special assessment. Pet.App.47a–48a.

C. Decision Below

1. Mr. Jones appealed—arguing that his 57-month sentence combined with numerous Rule 11

violations made his guilty plea involuntary and therefore unconstitutional. *See Brady v. United States*, 397 U.S. 742, 748 (1970). In particular, Mr. Jones argued the court had misled Mr. Jones into thinking he faced a sentence of no more than 27 months and then sentenced him to 57 months in prison. The government and court of appeals agreed—leaving only "the question of remedy." Pet.App.4a.

2. Mr. Jones asked the court to vacate his sentence and to remand with instructions to sentence him to no more than 27 months—the maximum sentence that he thought possible when he pled guilty. CA6 Dkt. No. 14. Mr. Jones based his request on *United States v. Smagola*, in which the Sixth Circuit had reduced a defendant's sentence in similar circumstances—effectively curing the constitutional violation by rendering the district court's Rule 11 violations harmless. 390 F. App'x 438, 443–44 (6th Cir. 2010). Although Mr. Jones noted that *Smagola* did not compel the court to grant his requested remedy, he argued that resentencing him to 27 months or less was appropriate under the facts in his case.

In response, as the Sixth Circuit put it, the government offered merely "a single sentence asserting he was not entitled to that remedy, without citation or any explanation, in the conclusion of its brief." Pet.App.4a. The government otherwise ignored Mr. Jones's arguments about remedy—with no discussion of *Smagola* or any other relevant authorities. CA6 Dkt. No. 23. Instead, the government's brief detailed the district court's errors and explained why Mr. Jones was indeed entitled to

relief. The government did, in passing, propose its own remedy—to remand with instructions to allow Mr. Jones to withdraw his plea. But the government did not support its proposal with any citation or explanation. Nor did the government suggest that Mr. Jones's proposed remedy was unlawful.

In reply, highlighting the government's forfeiture, Mr. Jones renewed his request that the court vacate his sentence and remand for resentencing not to exceed 27 months. CA6 Dkt. No. 25. Recognizing that his requested remedy was one of several lawful remedies, Mr. Jones identified a number of equitable factors that weighed in his favor, and reiterated that the Sixth Circuit had previously ordered his requested remedy under similar facts in *Smagola*.

Two days before oral argument, the government submitted a Rule 28(j) letter briefly addressing the remedial question through reference to Sixth Circuit case law not previously cited. CA6 Dkt. No. 30 (citing *United States v. Ataya*, 884 F.3d 318 (6th Cir. 2018)). Later the same day, Mr. Jones responded to the government's letter. CA6 Dkt. No. 31.

3. In its opinion, the Sixth Circuit agreed with Mr. Jones and the government that the lower court had erred. The court also agreed with Mr. Jones that, despite the government's last-minute Rule 28(j) letter, the government's failure to address Mr. Jones's proposed remedy—which, in the court's view, Mr. Jones had "clearly and cogently" set forth—was an "obvious forfeiture." Pet.App.4a. But, rather than holding the government to its forfeiture and granting Mr. Jones's requested relief, the court divined an "independent obligation to get the law right in

criminal cases" from *Young v. United States* and denied Mr. Jones's request as legally impermissible (notwithstanding *Smagola*) based on arguments the government never raised. Pet.App.4a–7a (citing *Young*, 315 U.S. at 258–59).

The Sixth Circuit's reliance on *Young* is noteworthy. *Young* involved an unusual situation in which a criminal defendant argued—and the government agreed—that his conviction rested on a misreading of a federal statute. 315 U.S. at 257–58. Because this Court's "judgments are precedents," the *Young* Court explained that "the proper administration of the criminal law cannot be left merely to the stipulation of parties." *Id.* at 259. The Court thus vacated the conviction only after satisfying itself that the parties' stipulated reading of the statute was correct. *Id.* at 259–61.

In a move that appears to be without precedent, the Sixth Circuit opined that the reasoning in *Young* "applies just as forcefully to forfeiture" and imposes an "independent obligation to get the law right." Pet.App.4a–5a. Thus, despite the government's "obvious" forfeiture, the court developed its own arguments and crafted its own remedy *sua sponte*—explaining that it not only *could* take such action but was *obligated* to do so in Mr. Jones's case.[2] Pet.App.5a.

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[2] The Sixth Circuit did note that cases involving "difficult legal questions with uncertain answers" might justify holding "the government to its forfeiture." Pet.App.5a n.1. But the court stated an obligation to ignore forfeitures of legal arguments in criminal cases outside of this limited circumstance.

The Sixth Circuit then held it could not grant Mr. Jones's requested remedy, because the "proper" remedy for Rule 11 violations "is to vacate [the involuntary] plea and remand for [the defendant] to plead anew." Pet.App.6a. Although the court recognized its "broad discretion in crafting remedies for constitutional errors," the court held that this discretion was limited to habeas cases in which a court should "grant the least disruptive remedies possible to redress constitutional violations in state courts." *Id*. (quoting *Ruelas v. Wolfenbarger*, 580 F.3d 403, 410 (6th Cir. 2009)). The court thus sidestepped *Smagola* because that decision relied on habeas cases that the court found unpersuasive in the direct appeal context and, further, was unpublished. Pet.App.7a. Notwithstanding the government's forfeiture, the court thus denied Mr. Jones's request and gave "the district court the option of resentencing Jones to no more than 27 months or allowing him to plead anew." *Id*.

REASONS FOR GRANTING THE PETITION

This Court should grant review for four reasons. First, the decision deepens an existing circuit split regarding when—if ever—a court is obligated to reach forfeited legal arguments. Second, the decision below conflicts with this Court's precedent and places *Young* on a collision course with this Court's forfeiture cases. Third, because forfeitures are a regular occurrence within our adversarial system, the question presented is one of exceptional importance. Fourth, this case is an ideal vehicle.

I. THE DECISION BELOW DEEPENS AN EXISTING CIRCUIT SPLIT ON FORFEITURE IN CRIMINAL CASES.

The decision below deepens an existing circuit split over when—if ever—a court of appeals is obligated to raise and resolve forfeited legal arguments in criminal cases. At least three circuits have held that courts are never *obligated* to resolve a forfeited issue but can *choose* to do so under extraordinary or exceptional circumstances. *See United States v. Edwards*, 34 F.4th 570, 584 (7th Cir. 2022); *Campbell*, 26 F.4th at 872; *United States v. Garcia-Pillado*, 898 F.2d 36, 38–39 (5th Cir. 1990). In the Tenth and now the Sixth Circuits, however, courts *must* raise and resolve forfeited issues *sua sponte* when holding the government to its forfeitures would result in an outcome that is contrary to law. *See* Pet.App.4a–5a; *United States v. Moyer*, 282 F.3d 1311, 1317–19 (10th Cir. 2002).

1. Most courts use a two-step analysis when considering whether to address a forfeited issue. First, the court considers the threshold question of whether the facts present an "exceptional" or "extraordinary" case that would justify forgiving the forfeiture. *Edwards*, 34 F.4th at 584; *Campbell*, 26 F.4th at 872. If no such circumstances are present, then the forfeiture stands. If the case is exceptional, the court moves on to the second step—weighing whether the benefit of reaching the forfeited issue justifies departing from the adversarial system.

For example, the Eleventh Circuit, sitting *en banc*, recently reached a forfeited issue after applying this two-step analysis. *Campbell*, 26 F.4th at 872. In that

case, the court explained that "courts do have the ability to 'resurrect' forfeited issues *sua sponte* in 'extraordinary circumstances.'" *Id.* (quoting *Wood v. Milyard*, 566 U.S. 463, 471 n.5 (2012)). The court, then, identified five "extraordinary circumstances" that can satisfy the first step—empowering the court to "exercise [its] discretion to consider a forfeited issue." *Id.* at 873.[3] The court held that one of these five factors—that "the proper resolution of the issue is beyond any doubt"—was present, and proceeded to assess whether the facts of the case justified exercising the court's discretion. *Id.* at 877–80. The court then decided to exercise its discretion because the record contained all necessary facts to rule on the forfeited issue and allowed the court to avoid reversing an "ultimately correct judgment." *Id.* at 879–80.

The Seventh Circuit has taken a similar approach, holding that it could "base [its] decision on a forfeited ground when the record present[ed] an exceptional case." *Edwards*, 34 F.4th at 584 (cleaned up). In *Edwards*, the court found such circumstances were present because "the record provide[d] a clear disposition under . . . established constitutional precedent" that practically "jump[ed] off the page."

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[3] These five situations are: "(1) the issue involves a pure question of law and refusal to consider it would result in a miscarriage of justice; (2) the party lacked an opportunity to raise the issue at the district court level; (3) the interest of substantial justice is at stake; (4) the proper resolution is beyond any doubt; or (5) the issue presents significant questions of general impact or of great public concern." *Campbell*, 26 F.4th at 873 (citing *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1332 (11th Cir. 2004)).

Id. Having determined that it was *permitted* to reach the forfeited issue, the court exercised its discretion to reach the issue in order to "avoid the needless exploration of [the] unchartered [*sic*] constitutional matters" presented by the parties. *Id.* Thus, exceptional circumstances *permitted* the court to reach the forfeited issue, and the court *chose* to address the issue because it allowed the court to avoid thorny constitutional questions. *Id.* The Fifth Circuit has held similarly, permitting consideration of forfeited arguments in "the most exceptional cases." *Garcia-Pillado*, 898 F.2d at 40.

Under this framework, even in extraordinary or exceptional cases, courts can (and do) decline the invitation to revive forfeited arguments. For example, in *Garcia-Pillado*, the Fifth Circuit upheld a sentence that fell below the statutory minimum simply because the government had forfeited its opportunity to challenge the sentence. 898 F.2d at 38–39. The court explained that the government's forfeited argument was "doubtless correct" (which would constitute an exceptional case under either Seventh or Eleventh Circuit precedent). *Id.* But the Fifth Circuit nevertheless chose not to reach the argument in order to incentivize litigants—"including the United States"—to raise such issues "at the earliest opportunity." *Id.*

2. In the decision below, the Sixth Circuit split from these circuits by holding that courts have an "independent obligation to get the law right in criminal cases" that requires courts to raise and resolve government-forfeited arguments when holding the government to its forfeiture might lead to an outcome that is "contrary to law." Pet.App.4a–5a.

Although it recognized the government's "obvious forfeiture," the Sixth Circuit insisted that "the government's forfeiture [did] not allow the court to order a remedy that is contrary to law." *Id.* As an example, the court explained that, under *Young*, "a court could not sentence a defendant to less than the statutory minimum just because the government failed to object." Pet.App.5a. Yet the Fifth Circuit did *exactly* that in *Garcia-Pillado* by declining to reach a sentencing argument forfeited by the government even though it was "doubtless correct" and thereby affirming a sentence that fell below the statutory minimum. 898 F.2d at 39.[4] The Sixth Circuit's approach below is also fundamentally inconsistent with the approach followed by the Seventh and Eleventh Circuits, neither of which recognizes any judicial obligation to reach forfeited arguments even when the arguments might be correct.

The Sixth Circuit further explained that this obligation attaches unless a court is "facing difficult legal questions with uncertain answers." Pet.App.5a n.1. This flips the majority standard on its head by obligating courts to reach forfeited legal arguments by default—making it virtually impossible for the forfeiture of a legal argument to ever have teeth in a criminal case.[5] As noted, other circuits will not even

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[4] Notably, the forfeiture in *Garcia-Pillado* involved an argument first raised (but fully briefed) on appeal, which allowed the Fifth Circuit to more fully assess the argument. Here, in contrast, the Sixth Circuit raised arguments that were *not* briefed on appeal—making the outcome in this case even more extreme.

[5] This case makes evident the rarity of a "difficult legal question[]" under the Sixth Circuit standard. Although the panel

consider reaching a forfeited issue unless the case presents extraordinary or exceptional circumstances—and even then the matter is discretionary.

Yet the Sixth Circuit is not alone on this issue. The Tenth Circuit has similarly held that "the imposition of an illegal sentence" compels a circuit court to raise and resolve a forfeited argument *sua sponte*. *Moyer*, 282 F.3d at 1317–19. In *Moyer*, the Tenth Circuit vacated and remanded a defendant's sentence because the district court had not applied the appropriate sentencing enhancements. *Id*. The court held that it was obligated by circuit precedent to reach and resolve the forfeited issue to avoid the imposition of an unlawfully low sentence. *Id*. (citing *United States v. Zeigler*, 19 F.3d 486, 494 (10th Cir. 1994)). This

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below perceived Mr. Jones's proposed remedy to be unlawful, the Sixth Circuit had previously issued a similar remedy in *Smagola*, and other courts have also previously cured specific Rule 11 violations without requiring a new plea. *See, e.g.*, *United States v. Parra-Ibanez*, 936 F.2d 588, 597 (1st Cir. 1991) ("The Rule 11 violation at issue here is not one that cries out for full-scale relief [and] insofar as this type of departure from Rule 11 admits of simple resolution . . . we think that such a course should be taken."); *United States v. Khan*, 869 F.2d 661, 662 (2d Cir. 1989) ("permitting [defendant's] conviction and sentence to stand after the excision of that easily identifiable portion of the sentence" as to which his plea allocution had been defective). Thus, Mr. Jones's request was well within the realm of reason. Indeed, the Sixth Circuit's suggestion that such discretion exists exclusively in the habeas context is not consistent with *Smagola*, *Parra-Ibanez*, and *Khan*. Even if correct (which Mr. Jones does not concede), the Sixth Circuit's conclusion is hardly obvious and is certainly not "beyond any doubt" (so as to enable its consideration in the Eleventh Circuit). *Campbell*, 26 F.4th at 877.

obligatory rule stands in stark contrast to the discretionary analysis conducted in the other circuits.

3. Had Mr. Jones's case arisen in the Fifth, Seventh, or Eleventh Circuits, the outcome would have been different. For instance, the Fifth Circuit has prioritized incentivizing parties to present arguments in a timely manner over exercising discretion to reach forfeited issues. *See Garcia-Pillado*, 898 F.2d at 38–39. Under that analysis, the government would have been held to its forfeiture. Mr. Jones clearly presented his requested remedy in his opening brief, and the government had no excuse not to brief the issue in opposition. If the Fifth Circuit was willing to affirm a sentence that fell below statutory minimums, it would almost certainly have held the government to its forfeiture in this case.

This case also lacks any of the plus factors that other circuits have used to justify exercising discretion to reach forfeited issues. For instance, the Seventh Circuit chose to exercise its discretion in *Edwards* because the forfeited argument gave the court an alternative basis to affirm that avoided complicated constitutional questions that lacked a clear answer. 34 F.4th at 584. No such rationale applies here.

The Eleventh Circuit chose to reach the forfeited issue in *Campbell* in order "to avoid reversing a correct judgment." 26 F.4th at 879. As the court explained, courts of appeals have "discretion to affirm on any ground supported by the law and the record that will not expand the relief granted below." *Id.* (quoting *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1654 (2018)). And the court was "loath to

reverse the District Court simply because the Government failed to adequately defend the Court's ultimately correct judgment." *Id.* But this reasoning would have no impact in this case, where the Sixth Circuit was reversing the district court regardless.

* * *

As this case reflects, the courts of appeals' approaches to forfeiture in criminal cases are anything but uniform. Even within the two sides of the split over whether courts have an obligation to consider forfeited legal arguments, courts apply a variety of different standards—underscoring the confusion regarding this subject. This Court should thus step in to clarify the correct framework for this critical procedural question.

II. THE DECISION BELOW IS WRONG

The Sixth Circuit's decision in this case also cannot be reconciled with this Court's case law. Repeatedly, this Court has emphasized the fundamental importance of the party-presentation principle in our adversarial system of adjudication—recognizing only narrow exceptions to account for extraordinary cases. *See Sineneng-Smith*, 140 S. Ct. at 1579. The Sixth Circuit's decision ignores this critical feature of our judicial system, by making it the norm rather than the exception to reach forfeited legal arguments in criminal cases.

1. In our system, courts "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.* (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)). In other words, the American system of justice is an adversarial—not an inquisitorial—

system. And under this system, the parties are masters of the litigation. *See Castro v. United States*, 540 U.S. 375, 381–83 (2003). They choose which arguments to make. They explore the factual circumstances and present evidence and arguments to support their position. And they also make omissions. In those situations, the party that fails to raise an argument is typically stuck with the consequences.

Under this Court's precedent, if a party forfeits an argument, a court can resurrect the issue under the appropriate circumstances, but it does not have *carte blanche* to do so. *Wood*, 566 U.S. at 472. Indeed, much as the majority approach described above holds, this Court has explained that a court should consider reaching forfeited issues only when "extraordinary circumstances justif[y] the panel's takeover of the appeal." *Sineneng-Smith*, 140 S. Ct. at 1581. And even in extraordinary circumstances, the choice to forgive a forfeiture is discretionary (which, again, is the majority approach in the courts of appeals). *See Davis v. United States*, 512 U.S. 452, 464 (1994) ("[T]he refusal to consider arguments not raised is a sound prudential practice, . . . and there are times when prudence dictates the contrary.") (Scalia, J., concurring). "That restraint is all the more appropriate when the appellate court itself spots an issue the parties did not air below, and therefore would not have anticipated in developing their arguments on appeal." *Wood*, 566 U.S. at 473.

2. The Sixth Circuit's decision in this case runs counter to this precedent. The lower court did not identify any "extraordinary circumstances" to justify ruling on grounds the government never raised. Though this Court has not expounded an

authoritative list of extraordinary circumstances that can justify reaching a forfeited argument, it has explained that "[i]n criminal cases, departures from the party presentation principle have usually occurred 'to protect a *pro se* litigant's rights,'" *Sineneng-Smith*, 140 S. Ct. at 1579, or to correct technical deficiencies that might otherwise be dispositive in a case, *see Day v. McDonough*, 547 U.S. 198, 202 (2006). In other words, courts can exercise discretion to reach forfeited arguments when the alternative is the "inappropriately stringent application" of the law, but absent such concerns, courts "do not, or should not, sally forth each day looking for wrongs to right." *Sineneng-Smith*, 140 S. Ct. at 1579.

This case did not involve any such extraordinary circumstances. In fact, the beneficiary of the lower court's decision was the United States—"the quintessential sophisticated, repeat-player litigant." *Campbell*, 26 F.4th at 908 (Newsom, J., dissenting); *see also Greenlaw*, 554 U.S. at 244 (describing the United States as "the richest, most powerful, and best represented litigant to appear before" the Court). Nor did this case involve merely technical deficiencies that the court could easily and justifiably correct. *See Day*, 547 U.S. at 202 (forgiving forfeiture of statute of limitations defense that occurred due to miscalculation of elapsed time). Rather, by this Court's standards, this case was strikingly unextraordinary. The Sixth Circuit recognized that the government's forfeiture was "obvious" and that Mr. Jones had "clearly and cogently explained" why he was entitled to his requested relief. Pet.App.4a. Mr. Jones even had circuit precedent that showed that

the Sixth Circuit had awarded the relief he requested before. These simply are not "extraordinary circumstances."

Moreover, the Sixth Circuit's decision would make holding the government to its forfeitures the exception rather than the rule. This Court's precedent make it clear that courts do not have "*carte blanche* to depart from the principle of party presentation" by reaching forfeited issues. *Wood*, 566 U.S. at 471 n.5, 472. In other words, reaching forfeited issues should be the exception. But the opinion below flips this rule by indicating that "courts can appropriately hold the government to its forfeiture[s]" only in the occasional case involving "difficult legal questions with uncertain answers." Pet.App.5a n.1. This is precisely what this Court forbade in *Wood* and its progeny. 566 U.S. at 471 n.5, 472.

3. The Sixth Circuit's novel application of *Young* to forfeitures further conflicts with this Court's precedent. The Sixth Circuit insisted that *Young* "applies just as forcefully to forfeiture" as it does to stipulations, Pet.App.5a, but Mr. Jones is not aware of any prior case in which *Young* has been extended to a forfeiture. Instead, to date, this Court and the courts of appeals have cited *Young* to support "conduct[ing] [their] own examination of the record in all cases where the Federal Government or a State confesses that a conviction has been erroneously obtained." *Sibron v. New York*, 392 U.S. 40, 58 (1968); *see, e.g.*, *United States v. Blaszczak*, 56 F.4th 230, 242 (2d Cir. 2022); *United States v. Matchett*, 802 F.3d 1185, 1194 (11th Cir. 2015); *United States v. Bell*, 991 F.2d 1445, 1448 (8th Cir. 1993); *United States v. Jackson*, 336 F. App'x 282, 284 (4th Cir. 2009).

Young concerned a situation in which the parties *agreed* on an understanding of the law, which this Court declined to adopt without its own, independent analysis. By extending *Young* to the situation where the parties *disagree* on the proper result, but where one party forfeits its arguments, the Sixth Circuit placed *Young* in direct conflict with this Court's separate jurisprudence on party presentation and the adversarial system. In other words, the "independent obligation to get the law right" that the Sixth Circuit extracted from *Young*, Pet.App.4a–5a, conflicts with this Court's suggestion that, even when extraordinary circumstances are present, the choice to forgive a forfeiture and to resolve an issue on the merits is a matter of discretion for the appellate court. This Court should intervene in order to clarify the proper scope of *Young* and the continued force of the party presentation principle in criminal cases.

III. THE QUESTION PRESENTED INVOLVES A RECURRING ISSUE OF EXCEPTIONAL IMPORTANCE

This Court's review is also warranted in light of the recurring nature and exceptional importance of the question presented. Taken to its logical end, the decision below would transform our judicial system from an adversarial system to an inquisitorial system.

The party presentation principle is a fundamental feature of our adjudicatory system and serves numerous policy interests that would be compromised by adopting the lower court's reasoning in this case. For example, party presentation serves a truth-finding purpose by encouraging the parties to fully ventilate the issues presented by the case so that the

whole truth may be uncovered. "[O]ur legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error." *Mackey v. Montrym*, 443 U.S. 1, 13 (1979). Parties, then, "are responsible for advancing the facts and arguments entitling them to relief." *Castro*, 540 U.S. at 386 (Scalia, J., concurring in part and concurring in the judgment). Unlike an inquisitor or a prosecutor, a judge does not "conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties." *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991).

Adherence to the party presentation principle also ensures that parties are on notice of the issues a court may consider in adjudicating their case and grants litigants the opportunity to "adequately . . . test the [other side's] case." *Penson v. Ohio*, 488 U.S. 75, 84 (1988). Judicial interference with the adversarial system, then, undermines the fundamental fairness of judicial proceedings by introducing issues without sufficient notice to the parties. And in the criminal context, such incursions violate core separation of powers principles by casting judges as adjunct prosecutors who fill the gaps in the government's case.

Relatedly, the adversarial system protects the impartiality (and the appearance of impartiality) of the judiciary. "If a court engages in what may be perceived as the bidding of one party by raising claims or defenses on its behalf, the court may cease to appear as a neutral arbiter, and that could be damaging to our system of justice." *Burgess v. United States*, 874 F.3d 1292, 1300 (11th Cir. 2017).

The adversarial system and party presentation principle thus help ensure the orderly and peaceful resolution of disputes. *See Campbell*, 26 F.4th at 896 (Newsom and Jordan, J.J., dissenting). Indeed, "if a party is intimately involved in the adjudicatory process and feels like he has been given a fair opportunity to present his case, he is likely to accept the results whether favorable or not." Stephen Landsman, *The Adversary System: A Description and Defense* 44 (1984). But "if the grounds for the decision fall completely outside the framework of the argument, making all that was discussed or proved at the hearing irrelevant . . . the adjudicative process has become a sham, for the parties' participation in the decision has lost all meaning." Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 388 (1978).

Forfeiture is a feature—rather than a flaw—of the adversarial system because it reinforces these policy goals. *See United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring in the judgment) ("The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one."). And adopting a rule requiring courts to forgive any forfeiture that might lead to an outcome that is "contrary to law" would refashion our system as an inquisitorial system. As such, this Court has long prioritized preservation of the adversarial system over the legal soundness of any isolated outcome in a particular case. *See, e.g.*, *Greenlaw*, 554 U.S. at 241–42 (reinstating district court's sentence that was fifteen years below the statutory minimum

because the government failed to challenge the sentence); *Puckett v. United States*, 556 U.S. 129, 133–34 (2009) (affirming Fifth Circuit's refusal to reach forfeited argument even though "error had occurred and was obvious"). Thus, the fact that a forfeiture may lead to an outcome that is "contrary to law" is not enough to override the party presentation principle—which, as the decision below reflects, is a point that this Court needs to clarify.

IV. THIS CASE IS AN IDEAL VEHICLE

Finally, this case provides an excellent vehicle to assess whether a court's obligation to get the law right overrides the party presentation principle of our adversarial system. This Court's jurisdiction is not in doubt. 28 U.S.C § 1254(1). Also, the lower court held that the government's failure to brief the remedial issue was an "obvious forfeiture." Pet.App.4a. As such, this case is an unusually clean vehicle for considering whether a court is obligated to reach forfeited legal arguments in a criminal case.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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